(2)

No. 88-2006

Supreme Court, U.S.
FILED
AUG 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS ETC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOSEPH E. DESIO
Acting General Counsel

D. RANDALL FRYE
Associate General Counsel

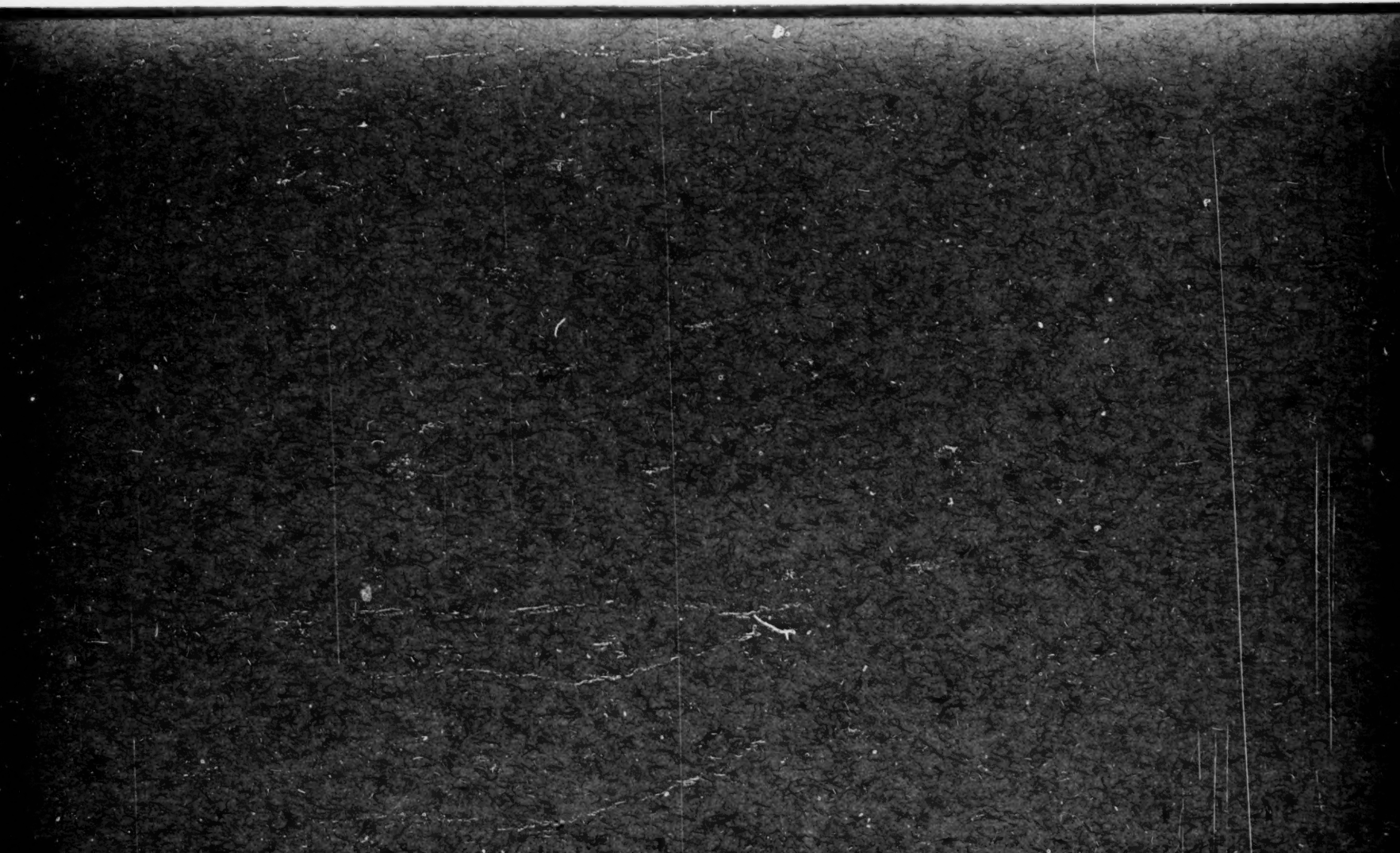
ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney
National Labor Relations Board
Washington, D.C. 20570

14pp



QUESTION PRESENTED

Whether the Natonal Labor Relations Board reasonably determined that petitioners violated Section 8(b)(1)(A) of the National Labor Relations Act (29 U.S.C. 158(b)(1)(A)) by imposing restrictions on resignation from union membership.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Engineers & Scientists Guild (Lockheed-California Co.), 268 N.L.R.B. 311 (1983) 10

Food & Commercial Workers Local 81 (MacDonald Meat), 284 N.L.R.B. No. 131 (July 17, 1987) 4

Machinists Local 1414 (Neufeld Porsche-Audi), 270 N.L.R.B. 1330 (1984) 4, 6, 7, 8, 9

NLRB v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967) .. 8

NLRB v. *International Union, UAW*, 320 F.2d 12 (1st Cir. 1963) 10

NLRB v. *Local 73, Sheet Metal Workers' Int'l Ass'n*, 840 F.2d 501 (7th Cir. 1988) 5-6

NLRB v. *Sheet Metal Workers' Int'l Ass'n, Local 16*, 873 F.2d 236 (9th Cir. 1989) 6

Pattern Makers' League of North America v. *NLRB*, 473 U.S. 95 (1985) 5, 9-10

Scofield v. *NLRB*, 394 U.S. 423 (1969) 6

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

§ 7, 29 U.S.C. 157 ..... 3, 4, 5, 7, 10

§ 8(a)(3), 29 U.S.C. 158(a)(3) 7

§ 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A) 3, 4, 5, 6, 7, 8, 9

§ 8(b)(2), 29 U.S.C. 158(b)(2) 7

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-2006

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS ETC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 865 F.2d 791. The court's order denying a petition for rehearing en banc (Pet. App. 44a-45a) is unreported. The decision and order of the National Labor Relations Board (Pet. App. 13a-15a), including the decision of the administrative law judge, is reported at 283 N.L.R.B. 182. The Board's order denying petitioners' motion for reconsideration (Pet. App. 35a-36a) is unreported. The Board's supplemental decision and order (Pet. App. 37a-39a) is reported at 285 N.L.R.B. No. 149.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1989 (Pet. App. 46a-51a). The petition for a

writ of certiorari was filed on June 8, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 449, maintain and enforce a rule, contained in the constitution of the International, that places restrictions on its members' right to resign from the union. The rule permits a union member to resign only if (1) the resignation is submitted during a ten-day period at the end of the local union's fiscal year; (2) the member is not in arrears in the payment of any financial obligations to the union; and (3) there are no internal union charges pending against him. The resignation must be in writing, and sent by registered or certified mail to a designated official of the local union. A resignation that satisfies these conditions becomes effective 60 days after the end of the local union's fiscal year or on the expiration of any applicable dues checkoff authorization, whichever is later. Pet. App. 3a-4a.

Petitioners were parties to a collective bargaining agreement covering employees at the Rockford, Illinois plants of the Keystone Consolidated Industries, Inc. Following expiration of the agreement in April 1983,[1] the parties reached an impasse in negotiations on a new contract, and the union called a strike. During the strike, 41 employees at the Rockford plants submitted resignations from union membership to the office of Local 449 and returned to work. Pet. App. 3a.

In October, several members of Local 449 including its president, brought internal union charges against all but one of the 41 employees, alleging that they had engaged in

[1] All dates hereafter are in 1983, unless otherwise indicated.

"conduct unbecoming a union member" by resigning without complying with the constitutional restrictions and by returning to work during the strike. The executive board of the local union found the charges "not to be improper" under the constitution, clearing the way to bring the charged employees to trial under petitioners' procedures. Pet. App. 3a, 22a-23a.[2]

Each of the charged individuals was notified of the executive board's finding, and was informed that the charges would be "administered" as provided by the International constitution. Petitioners, however, took no additional steps to process the charges or impose sanctions. Pet. App. 3a, 22a-24a.

2. The Board found that petitioners violated Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A),[3] by maintaining the restrictions on resignation contained in the International constitution and by

---

[2] The constitutional provision at the time the strike began gave the Local the power to reprimand members found guilty of the charges, to suspend or expel them from union membership, or to assess a fine not to exceed $100. At its convention in May 1983, the International amended its constitution to remove the authorization for the imposition of fines. Pet. App. 14a n.1, 24a. The administrative law judge, whose findings were adopted by the Board (Pet. App. 14a), acknowledged that, in the wake of the May 1983 amendment, "the only actions that can be taken against a member found guilty as charged [of violations of the resignation rules] are suspension or removal from union office or suspension or expulsion from membership." Pet. App. 24a.

[3] Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of rights guaranteed by Section 7 (29 U.S.C. 157), with the proviso that a union's right to prescribe its own rules with "respect to the acquisition or retention of membership" shall not be impaired.

Section 7 of the Act guarantees employees the right, inter alia, to join or assist a labor organization and the right to refrain from such activities.

refusing to accept the resignations submitted during the 1983 strike. Pet. App. 14a, 28a. The Board reiterated its holding in *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 N.L.R.B. 1330 (1984) (*Neufeld*), "that *any* restriction on resignation from union membership is invalid, irrespective of the period of restriction, and that the mere maintenance of a constitutional provision restricting resignation restrains and coerces employees from exercising their Sec. 7 rights." Pet. App. 14a n.1. The Board specifically rejected petitioners' contention that, because no fines were imposed to enforce the restrictions on resignation, there could be no violation of the Act. It adopted the administrative law judge's statement (Pet. App. 24a) that "[w]hether or not * * * fines [are] levied is only significant in that they may be coercive restrictions on the exercise of [an employee's] right [to resign from the union]." See Pet. App. 14a. The Board directed petitioners to remove the restrictions on resignation from the constitution and all other governing documents of the International and Local 449, and to accept the submitted resignations. Pet. App. 14a n.2, 29a-30a.[4]

2. The court of appeals found that the Board's interpretation of Section 8(b)(1)(A) was reasonable and, with a

---

[4] The Board's original order also required petitioners to dismiss all intra-union charges brought against the employees who had crossed the picket lines (Pet. App. 30a). In a supplemental decision and order (Pet. App. 37a-39a), the Board removed that provision from its order, citing its then-recent holding in *Food & Commercial Workers Local 81 (MacDonald Meat)*, 284 N.L.R.B. No. 131 (July 17, 1987). In that decision, the Board held that a union's suspension or expulsion of members after they have resigned their union membership does not violate employees' Section 7 rights because it does not coerce them in their association with the union. Such action is therefore protected by the proviso to Section 8(b)(1)(A), see note 3, *supra*, which permits a union to prescribe its own rules.

single exception,[5] enforced the Board's order (Pet. App. 1a-12a). The court observed that the Board had followed its decision in *Neufeld,* in which it held that any restriction a union imposes on resignation is invalid under Section 8(b)(1)(A). The court also noted that *Neufeld* had been cited with apparent approval by this Court in *Pattern Makers' League of North America* v. *NLRB*, 473 U.S. 95, 103, 105 (1985) (*Pattern Makers'*), in upholding the Board's decision that a union violated Section 8(b)(1)(A) by imposing fines on union members who resigned and returned to work during a strike. Pet. App. 6a-7a.

The court of appeals rejected petitioners' contention that this Court's finding of a violation of Section 8(b)(1)(A) in *Pattern Makers'* was based not on the Union's maintenance of a "constitutional restriction on the right to resign," but on the fact that the union "levied heavy fines against the members who attempted to resign." Pet. App. 8a. The court noted (Pet. App. 11a-12a) that the Seventh Circuit had applied *Pattern Makers'* in analyzing restrictions similar to those contained in petitioners' constitution, and had concluded that, despite the fact that no fine was imposed, the union in that case had violated the Act by impeding the employees' right to resign. See *NLRB* v. *Local 73, Sheet Metal Workers' Int'l Ass'n,* 840 F.2d 501 (7th Cir. 1988). The court agreed with the Board's view that the resignation restrictions in petitioners' constitution impaired " 'the statutory policy of voluntary unionism' " (Pet. App. 11a, quoting *Sheet Metal Workers'*

---

[5] The court noted that "[n]either the ALJ nor the Board discussed the requirement that a member's resignation be in writing and sent to a designated officer" of the Union. The court declined to enforce the order directing the Union to eliminate these requirements, finding that they did not, on their face, "restrain[ ] or coerc[e] members" in violation of Section 7 of the Act, and that they served a legitimate union recordkeeping purpose. Pet. App. 12a.

Int'l Ass'n, 840 F.2d at 508) and upheld the Board's determination that the union violated Section 8(b)(1)(A) by maintaining and enforcing those restrictions.

ARGUMENT

The court of appeals in this case appropriately deferred to the decision of the Board, which was reasonable and consistent with the decisions of this Court and other courts of appeals. The Board applied its holding in *Neufeld,* 270 N.L.R.B. 1330 (1984), to conclude that the Union's restrictions on resignation violated Section 8(b)(1)(A) of the Act. And the court of appeals held that the Board's interpretation of Section 8(b)(1)(A) was reasonable and consistent with this Court's decision in *Pattern Makers'.* The two other courts of appeals that have struck down similar restrictions on resignation have endorsed the Board's decision in *Neufeld* and agreed with the Board's view of *Pattern Makers'* as expressed in that decision. See *NLRB* v. *Local 73, Sheet Metal Workers' Int'l Ass'n,* 840 F.2d at 504-505; *NLRB* v. *Sheet Metal Workers Int'l Ass'n, Local 16,* 873 F.2d 236, 237 (9th Cir. 1989). Further review is therefore unwarranted.

1. In *Neufeld,* the Board held that "*any* restrictions placed by a union on its members' right to resign" violate Section 8(b)(1)(A) of the Act and are unlawful. 270 N.L.R.B. at 1333 (emphasis added). The Board analyzed resignation restrictions under a three-part test propounded by this Court in *Scofield* v. *NLRB,* 394 U.S. 423 (1969): a union rule is valid if it "reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." *Id.* at 430. The Board concluded that rules impeding a worker's right to resign at will fail the second and third parts of

this test. The Board found, first, that resignation restrictions restrain members in the exercise of their Section 7 right to refrain from any and all concerted activities. Section 7 protects "not only the right to refrain from strikes but also the right to resign union membership." *Neufeld,* 270 N.L.R.B. at 1333. Second, the Board found that, by compelling a member to maintain full union membership, resignation restrictions collide with the statutory policy of voluntary unionism implicit in Sections 8(a)(3) and 8(b)(2) of the Act, 29 U.S.C. 158(a)(3) and 158(b)(2). *Neufeld,* 270 N.L.R.B. at 1333. Third, the Board found that resignation restrictions would "impair the fundamental policy repeatedly recognized by the Supreme Court" in distinguishing between permissible "internal union actions" and proscribed "external union actions" by permitting the "artificial[ ] expans[ion of] the definition of internal actions" (*ibid.*). For it is only by virtue of the rule forcing employees to remain in the union that the union is able to regulate employee conduct over which it would otherwise have no control. See *ibid.*

The Board in *Neufeld* also explained that resignation restrictions could not be justified under the proviso to Section 8(b)(1)(A), which safeguards a union's right to prescribe its own rules about the acquisition and retention of membership. "[W]hile a union can enact and enforce [membership] rules that are internal in scope and target, it possesses no statutory authority to impose its will on employees who exercise their Section 7 right to resign and thereby refrain from concerted activity." 270 N.L.R.B. at 1335. And finally, with reference to the *Scofield* requirement that a union rule must be reasonably enforced against union members who are "free to leave the union and escape the rule," the Board believed it to be self-evident that this principle is violated by a rule that tells

members that they are not, in fact, free to leave the union. *Id.* at 1334.

2. Petitioners claim that the Board's holding is inconsistent with this Court's decisions in *Pattern Makers'* and in *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967). See Pet. 7-10. They rely on the distinction drawn in *Allis-Chalmers* between "internal and external enforcement of union rules," and the Court's statement in that case that Congress did not intend Section 8(b)(1)(A) "to interfere with the internal affairs or organization of unions." 388 U.S. at 187 (citation and emphasis omitted). They claim that *Pattern Makers'*, while establishing that a union violates the Act by imposing fines for improper resignation, reaffirmed the *Allis-Chalmers* holding that regulations not affecting union members' employment status are permissible "internal" rules. They maintain that, because the UAW cannot levy fines against members who resign in defiance of union rules, and because the resignation restrictions at issue here do not otherwise affect members' employment status, the restrictions represent permissible "internal" union rules.

This contention is in error. Indeed, both *Allis-Chalmers* and *Pattern Makers'* lend strong support to the Board's holding in this case. In *Allis-Chalmers*, the Court held that a union did not commit an unfair labor practice by fining members for crossing a picket line (and suing in state courts to collect the fines), but placed great stress on the fact that "the fined employees involved herein enjoyed *full union membership.*" 388 U.S. at 196 (emphasis added). The employees in question had made no effort to resign from the union before or after committing the violations of union rules for which they were fined. The Court's decision in *Pattern Makers'* was a natural corollary of *Allis-Chalmers*. Although a union has authority to impose sanctions on its *current* members, it cannot restrict their Sec-

tion 7 right to resign from membership and thus to remove themselves from the union's machinery for internal discipline.

The facts of *Pattern Makers'* involved the imposition of fines for improper resignation, but the principle on which the decision rested was not limited to those facts. To the contrary, the Court stressed that there is an "inconsistency between union restrictions on the right to resign and the [Act's] policy of voluntary unionism" (473 U.S. at 105), and stated that the Act protects the employees' right "to resign from a union at any time," 473 U.S. at 106. The Court also cited with approval the Board's decision in *Neufeld,* in which the Board had unequivocally embraced the principle that "*any* restrictions placed by a union on its members' right to resign * * * are unlawful." 270 N.L.R.B. at 1333 (emphasis added). See 473 U.S. at 105. The Court thus accepted the Board's judgment in *Neufeld* that union rules that significantly impede resignation, thereby compelling members to retain full membership, are incompatible with the statutory policy of voluntary unionism. 473 U.S. at 104-107.

Finally, the Court in *Pattern Makers'* agreed with the Board's conclusion in *Neufeld* that Congress's decision to include a proviso in Section 8(b)(1)(A) that would enable unions to preserve control over their internal affairs "does not suggest an intent to authorize restrictions on the right to resign" (473 U.S. at 102 (citing *Neufeld,* 270 N.L.R.B. at 1333)), in that "union constitutional provisions restricting the right to resign were uncommon, if not unknown [in 1947]." 473 U.S. at 103 (footnote omitted). Indeed, the Court noted that neither it nor the Board had "ever interpreted the [Section 8(b)(1)(A)] proviso as allowing unions to make rules restraining the right to resign." 473 U.S. at 108-109. The Court found that the Board had reasonably interpreted the phrase "rules with respect to the acquisition

or retention of [union] membership" as encompassing "union rules involving admission and expulsion," but not "rules restricting the right to resign" (*ibid.*; see also *id.* at 116 (White, J. concurring)).[6]

3. Contrary to petitioners' contention (Pet. 9), the rule restricting resignation from union membership can have a coercive impact on employees in the exercise of their Section 7 right to resign even though the only sanction for violation of the rule is "reprimand or suspension or expulsion from union office or union membership" rather than a court-enforceable fine. As the Board explained in *Engineers & Scientists Guild (Lockheed-California Co.)*, 268 N.L.R.B. 311 (1983), the mere maintenance of a constitutional provision restricting resignations "restrains and coerces employees, who may be unaware of the provision's unenforceability, from exercising their Section 7 rights." Its effect is "analogous to the effect of an * * * overly broad no-solicitation rule," which, under settled law, tends to restrain and coerce employees whether or not it is enforced. *Id.* at 311 & n.3.

---

[6] Nor is it material, as petitioners contend (Pet. 11), that the rule here may serve a legitimate union interest. The rule barring resignations during a strike in *Pattern Makers'* advanced the legitimate union interest of preserving solidarity in a strike; yet, that was not sufficient to privilege the rule. As noted above, a union rule that "reflects a legitimate union interest" satisfies only one part of the *Scofield* test; the rule may nevertheless be found to be invalid if it fails the remaining parts of the test—as petitioners' rule does—by violating workers' rights to refrain from union participation.

To the extent that *NLRB* v. *International Union, UAW*, 320 F.2d 12 (1st Cir. 1963) (Pet. 11), holds to the contrary, the conflict is immaterial because that decision was superseded by this Court's subsequent decisions in *Scofield* and *Pattern Makers'*.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JOSEPH E. DESIO
Acting General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney
National Labor Relations Board

AUGUST 1989

U.S. GOVERNMENT PRINTING OFFICE 1989—241-699/00385